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No. 80-1551

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF THE APPLICATION

OF

FRANK GODERRE,

Petitioner,

—against—

CITY OF PEEKSKILL, JOHN E. WALSH, City Manager and Commissioner of Public Safety, and CITY OF PEEKSKILL POLICE DEPARTMENT, WALTER J. JONES, Police Commissioner,

Respondents.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Jurisdiction

Petitioner claims jurisdiction under 28 U.S.C.A. §1257(3) which provides in pertinent part as follows:

> §1257. *State courts; appeal; certiorari*
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statutes Involved

The statutes here involved are McKinney's, Book 9, New York Civil Service Law Sections 75 and 76 which provide in pertinent part as follows:

> § 75. *Removal and other disciplinary action*
>
> "1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, * * *

"2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

"3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency of misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for

a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

"4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

§ 76. *Appeals from determinations in disciplinary proceedings.*

"1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal.

"2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

"3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

"4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been pre-

ferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred."

Statement of the Case

Chronology of events in Goderre's police career.

On April 13, 1973, Goderre was appointed to the position of Police Officer with the City of Peekskill (R. 21).*

Two years later, on May 4, 1975, Goderre grabbed a 13 year old youth by the collar in Police Headquarters while the youth was complaining about a " 'cop bothering me out on the street' " (R. 53). In the presence of Sergeant William J. Carlin, Acting Sergeant Anderson, a Detective Rundel, Goderre tried to drag him into the officer's locker room (R. 53). Sergeant Carlin "told Goderre to let go of the youth and it took a couple of minutes for it to register. This was a complete loss of control on the part of Ptl. Goderre, with shouting almost to the point of hysteria" (R. 53). This was "not the only time that this loss of control has happened to Ptl. Goderre. There have been a couple of times that it has happened and I told him so this afternoon" (R. 53). He was later reprimanded (R. 53).

In August 1977, Goderre was admonished for abusing another child (R. 41).

On August 24, 1977 (the incident which precipitated Goderre's discharge), armed with a Suffolk County tele-

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* Parenthetical page reference in the Record of the New York State Court of Appeals.

type identification features of a one Pedro Juan Rivera, to wit: his age, height, weight, color, mustache, scar on his nose, and tattoo on his shoulders with the words: "Padre, Madre, Mia," Goderre arrested a man having the same first and last name (no middle name), 12 years younger but having no mustache, no scar on his nose, and no tattoo on his shoulders (R. 14 & 42).

On October 18, 1977, after an inter-departmental investigation, Police Commissioner Walter J. Jones recommended to the Peekskill City Corporation Counsel that the City defend Mr. Goderre in a Supreme Court false arrest action brought against the City and Mr. Goderre (R. 158).

On April 28, 1978, a one Simon Knight complained to Police Commissioner Walter D. Kirkland that because Goderre lost a fist fight with him, Goderre subsequently refused to take any police action against an individual throwing rocks at his van (R. 41-42). Apparently Goderre was moonlighting as an auto-body repairman and insisted that Mr. Knight had to accept the inferior auto body repair job because Goderre was a Police Officer (R. 42). The fist fight then ensued (R. 42).

On May 25, 1978, a Mr. Torrisi, who came to Police Headquarters upon a request by it regarding a possible connection with an alleged hit and run accident in the neighboring town of Yorktown, left the Peekskill Police Headquarters after a period of time because the Yorktown Police did not appear (R. 42). Goderre drew his service revolver and pointed it at Mr. Torrisi's head, forcing him to the ground on his belly, pushing his foot into his back, handcuffing him and returning him to Police Headquarters (R. 42).

On Thursday, May 18, 1978, Goderre was informed that a one Perry Maxey was seen at City Hall at or about the time someone had her pocketbook stolen (R. 43). "Without ascertaining the facts nor a description of the purse snatcher

* * * who was wearing blue jeans and blue and white sneakers", moments later Goderre entered an apartment and arrested Perry Maxey who was not wearing blue jeans and blue and white sneakers, but rather was a Peekskill employee in City Hall to pick up his pay check (R. 47).

On July 10, 1978, a $6,798.15 judgment was served upon the City by Pedro Rivera who successfully won his false arrest action against the City and Goderre (R. 164).

On the basis of the Perry Maxey false arrest and a further investigation in the Pedro Rivera false arrest case, on July 12, 1978, the City recanted its opinion that Goderre be defended (R. 57), that is, recanted the recommendation to defend him in the false arrest action (R. 158).

On July 14, 1978, the City gave Mr. Goderre a copy of the judgment and advised him that it did not intend to appeal, and that if he chose to appeal he could do so at his own expense (R. 164). Mr. Goderre never appealed the Judgment.

On August 9, 1978 Mr. Goderre was served with the present charges (R. 130), and on August 21, 1978 the hearing commenced and concluded on August 24, 1978 (R. 58-68, & 69-127).

On September 8, 1978 [allowing 90 days to lapse], formal charges were served upon Mr. Goderre for wrongfully arresting Perry Maxey (R. 55-56).

Finally, on September 19, 1978, Mr. Goderre was served with the Findings and Determination firing him, and at that time the disciplinary charges arising out of the Perry Maxey false arrest matter were "withdrawn without prejudice" (R. 30).

Trial before Mr. Justice Jones.

At a plenary trial in the Supreme Court Westchester County, Acting Supreme Court Justice Howard A. Jones found that Pedro Rivera was "wrongfully arrested" (R. 138), "and was unlawfully detained for over two hours" (R. 138).

The facts, as found by Mr. Justice Jones, are that pursuant to a Suffolk County teletype seeking the arrest of a one Pedro Juan Rivera for attempted robbery, there was sufficient biographical data to distinguish the person sought from the plaintiff in that action (R. 139). The teletype (R. 157) provides, *inter alia,* the following data:

> PEDRO JUAN RIVERA
> BORN AUGUST 4, 1956
> HEIGHT 5′ 6″
> WEIGHT 156 LBS.
> EYES BROWN
> HAIR BROWN
> ARREST WARRANT
> ATTEMPTED ROBBERY

Led by Sergeant Hayes, a group of officers went to the Plaintiff's residence and were informed by the landlady that he was on an employment-related trip as an independent long-haul trucker (R. 139).

Upon their return to headquarters, a hand written note by Sergeant Hayes was posted with the teletype (R. 139). The hand written note (R. 162) contained the following additional information:

> TATTOO CROSS ON LEFT SHOULDER
> PERODOU MADRA MIA ON BACK
> MUSTACHE
> SCAR ON NOSE

Three days later, on August 27, 1977, Goderre saw the teletype and memo still posted and late saw Plaintiff's rig parked near his apartment (R. 140). After verifying that he was home, Goderre called a backup team (R. 140).

Shortly after Plaintiff had gone to sleep, he was awakened by Goderre, placed under arrest, compelled to dress and taken to Police Headquarters in handcuffs (R. 140).

At Police Headquarters, "a simple physical examination for identifying scars and tattoos eliminated him as the wanted suspect" (R. 140).

Mr. Justice Jones found "a total lack of preliminary inquiry or observation at the apartment as to full name, age, date of birth, color of hair, height, and weight (all different), mustache, scars or tattoos (all non-existant) and Suffolk County residents (Plaintiff was a Peekskill resident for sixteen years)" (R. 140-141).

Mr. Justice Jones found that contrary to Mr. Goderre's claim that the Plaintiff was detained a mere 15 minutes at Police Headquarters, the preponderance of evidence was that Plaintiff was detained at Headquarters approximately 2 hours (R. 141).

Mr. Justice Jones also found Mr. Goderre's claim that no one witnessed plaintiff being led to the police vehicle was "incredible" and contrary to the fact that several people including neighbors and relatives were present (R. 142).

Disciplinary proceedings against Goderre.

On August 9, 1978, Goderre was served (R. 130) with charges and specifications for wrongfully arresting Pedro Rivera (R. 132) in violation of the Police Rules of Conduct §§12.1.1, 12.1.5, and 12.1.9, which provide as follows (R. 137):

> "12.1.1 Conduct which brings discredit upon the Department."
>
> "12.1.5 Inattention to duty."
>
> "12.1.9 Incompetency or inefficiency in the performance of duty."

On or about August 14, 1978 Goderre interposed a general denial (R. 149).

The disciplinary hearing was held on August 21, 1978, and Goderre was represented by counsel.

Without objection on the part of Mr. Goderre's counsel, Mr. Justice Jones' decision was introduced as an exhibit against Mr. Goderre (R. 163), as was the Judgment entered on it (R. 63-64). The City rested on the Decision and Judgment (R. 64).

At the request of Goderre's counsel, the hearing was adjourned to August 24, 1978 (R. 64-68).

At the continued date of the hearing, Goderre's first witness was Walter J. Jones, Deputy Commissioner of Public Safety (R. 69). He testified that in response to the Notice of Claim filed by Pedro Rivera he directed an investigation be conducted which consisted of

> "Interviewing of the officers concerned reviewing the paper reports" (R. 70).

Walter Kirkland and Det. Nelson conducted that investigation (R. 70).

He identified Goderre's Exhibit "3" (R. 151) which was submitted to Walter Kirkland (R. 71). It is the interview by Det. Nelson of Goderre (R. 71), and in it Goderre admits that he saw Sergeant Hayes message along with the teletype on the clipboard:

> "I was off a couple of days and came into work extra on the 27th. I seen the TT and message on the Clip board . . ." (R. 152).

The interview of Mr. Goderre by Det. Nelson continued,

> "Pedro Rivera was in his apartment with his wife * * * I advised Pedro Rivera of his rights and told him that there was a warrant for his arrest. I handcuffed took him down a flight of stairs and put him in the rear of my police car.
>
> * * * I took him to the interrogation room, took the hand cuffs off. Sgt. Shubert came to the interrogation with the teletype. When the names and age did not match, Sgt. Shubert left to make a phone call. He came back and we released Rivera. Before we released him he opened his shirt and there was no tattoos" (R. 152).

Next, Deputy Commissioner Jones identified Exhibit "4" (R. 153) which was an interview by Det. Nelson of Sergeant Shubert (R. 72). The interview of Sergeant Shubert by Det. Nelson stated:

> "When he came in with Rivera I knew it was the wrong one, because I knew the person that Goderre came in with. *I went down to the interrogation room and told Goderre that the T.T. stated the person who was wanted was 21 years of age. The person he has is 33.* I asked Rivera to take off his shirt and he had no tattoos only a few scars on the forearm. I told Goderre to release him" (R. 154). [Italics added for emphasis].

During the interview, Sergeant Shubert also stated that Mr. Rivera was only detained at the Police Headquarters "about 10 minutes" (R. 154).

Deputy Commissioner Jones identified the teletype (discussed earlier) as Exhibit "5" (R. 157). The investigation consisted of these three Exhibits, "3", "4", and "5", and they were the only documents of which he was aware (R. 72).

Based upon these three documents, Deputy Commissioner Jones, by his October 18, 1977 letter to the Peekskill Corporation Counsel, recommended that the City defend Goderre in the false arrest action brought against Goderre and the City by Pedro Rivera (R. 73-74, and R. 159).

Goderre's next witness was Richard LaBoda who testified that he received a telephone call from the Suffolk County Police, giving the information as to the height, weight, medium built, and tattoo and personally passed it on to Goderre:

> "I wrote it down as he was giving it to me and I passed it on to Patrolman Goderre * * *. When I passed it, I handed it to him personally" (R. 79-80).

Goderre then called Sergeant Edward Hayes to the witness stand (R. 80). He was one of the officers who accompanied Goderre to Pedro Rivera's home the first time on August 24, 1977 (R. 82), and saw Patrolman Goderre and Detective Evans enter the dwelling and converse with the landlady (R. 82).

Sergeant Hayes also stated that he would have "arrested" Pedro Rivera that first day based upon the information known to him (R. 83 & 84).

He identified his own handwritten note (Exhibit "8", R. 162) which he put on a clipboard (R. 83) on the basis of the information he received from Detective Shoenig (R. 83).

Goderre called John Michael Sindrich, a Police Officer who went to Pedro Rivera's home on the first day, August 24, 1977, with Goderre (R. 86). He testified that he too would have arrested Pedro Rivera on August 24, 1977 based upon the information then known (R. 88).

Goderre then called Sergeant Randy Shubert to testify (R. 89). Sergeant Shubert stated at headquarters that he looked at Pedro Rivera's driver's license and noticed the discrepancies:

> "I checked the date of birth on the license with the teletype that I had and they didn't correspond. I then asked Mr. Rivera if he would remove his shirt, so that I could check for tattoos and scars that were on the, I believe, handwritten message, and he did so. He didn't have marks or anything" (R. 90).

Petitioner Frank Goderre then testified (R. 94). Goderre conceded that he received the note handed to him by Mr. LaBoda (R. 96), that he conversed with Pedro Rivera's landlady on August 24, 1977, and that she told him he was a truck driver and was not then home (R. 97), but *denied* receiving any further information between August 24 and the day of the arrest on August 27, 1977:

> "Mr. Dempsey: Between August 24th and August 27th did anyone in Police Headquarters talk to you about Pedro Rivera?
>
> Ptl. Goderre: Not that I know of.
>
> Mr. Dempsey: Did anyone indicate to you that any further information had been received from Suffolk County about Pedro Rivera?
>
> Ptl. Goderre: Not that I know of" (R. 98).

Goderre testified that on August 27, 1977 he again saw and conversed with the landlady before proceeding to Pedro Rivera's apartment (R. 98).

Also prior to entering Pedro Rivera's apartment, Goderre encountered Pedro Rivera's wife, talked to her, *then* entered the apartment and found Pedro Rivera awake:

> "At the same time a woman came down the stairs. She was a Spanish woman and she identified herself as Mrs. Rivera. Immediately Patrolman Arthur Haugh, who was the responding back-up unit, met me at the front porch of 192 Union Avenue. We said we wanted to see her husband, she yelled up the stairs to the second floor apartment. I don't understand Spanish but she yelled Pedro and whatever else, I don't know, but she said something. We followed her upstairs to the hallway, we entered the apartment looked to the left and there was a man later identified to me as Pedro Rivera. He was awake." (R. 98).

Goderre continued,

> "He was standing in the living room, he had a shirt on and was just buckling his pants. I don't believe he had shoes or socks on. I advised him that there was that we had received a teletype printout for the arrest of him, for attempted robbery, first degree." (R. 99).
>
> * * *
>
> "Well, first I gave him what it was, the warrant for, also advised him of the Miranda warning from a prepared card. Then he said 'Gee, I don't know or something to the effect that I don't know what I could have done in Suffolk County. I said I have to take you to Headquarters, and he said, let me get dressed and put my shoes on. He also wanted

> to go to the bathroom. Considering that the armed robbery in the first degree, in my belief, is of a very violent nature, we did follow him wherever he went, only for our own safeguard, to check for weapons. He wanted to go to the bathroom, I looked into the bathroom to make sure there was nothing that could be used against Patrolman Haugh and myself. We also allowed him to put his shoes on, went to the bedroom. Then, when we got to the hallway, Mrs. Rivera said 'Wait (she was on the phone) my relatives are coming over, can you wait til they come?' At that point I figured it would only be worse circumstances of delaying, of staying there any longer. I said no we couldn't. I immediately . . ." (R. 99).

Goderre concedes that he did testify at the false arrest trial in Supreme Court (R. 103).

He was the only witness who testified on behalf of the defendants in that Supreme Court action (R. 103).

He concedes that he received the July 14, 1978 letter by the City's Corporation Counsel enclosing a copy of the judgment and advising him to appeal at his own expense if he was inclined to appeal (R. 104 & 164).

He conceded on cross-examination that on August 24, 1977 he did learn that the individual sought in the warrant had tattoos a scar on his face and a mustache (R. 105). He also conceded that he knew on August 24, 1977 that the scar was "on the nose" (R. 106), that the tattoo was "on the shoulder" (R. 106), and that the tattoos had the words "Padre, Madre, Mia" (R. 106).

After concluding his testimony, Goderre then called Arthur Haugh, a former police officer with the City (R. 113). He testified that he personally knew Pedro Rivera and that he too would have arrested Pedro Rivera based upon the information then known (R. 115).

However, this witness, Mr. Haugh, resigned as a police officer under a cloud (R. 116). Apparently, there were two prior disciplinary proceedings brought against this witness (R. 117). One resulted in a suspension and the other resulted in his forced resignation (R. 117). Both charges were for "incompetence" and "misconduct" (R. 117).

Goderre's next witness was Police Officer Vincent Puma (R. 119). He was called to offer independent expert testimony concerning the propriety of the conduct of Goderre (R. 119). The Hearing Officer would not allow this testimony (R. 121).

Goderre's last witness was Benjamin B. Hersh, Esq., an attorney in Peekskill (R. 122), who tried the false arrest action on behalf of Pedro Rivera (R. 124).

He testified that in the Supreme Court false arrest action, on Plaintiff's case, Pedro Rivera, his wife, and a neighbor testified (R. 124).

The City's prosecuting attorney advised the Hearing Officer that he wished the Hearing Officer to review Goderre's personnel file (R. 126). The City agreed to allow Mr. Goderre's attorney to review the same personnel file (R. 126). Mr. Goderre consented to this (R. 126).

Findings and Determination of Hearing Examiner.

On September 19, 1978, Goderre was given a copy of the Findings and Determination of John E. Walsh, the Hearing Examiner (R. 30).

After reciting the findings of fact and conclusions of law and the decision of Acting Supreme Justice Howard A. Jones (R. 31-34), the Hearing Examiner enumerated the witnesses and documents admitted into evidence at the disciplinary hearing (R. 35-36).

The Hearing Examiner stated that he carefully considered this evidence, then, "based upon the record herein", he found Goderre guilty of the charges (R. 36-37).

ARGUMENT

POINT I

Question was never presented to the New York State Courts.

The tendered federal questions have never been presented to the state courts. This is a prerequisite under 28 U.S.C.A. §1257. *Crowell* v. *Randell,* 35 U.S. 368, [10 Pet.], 9 L.Ed. 458 (1836). Indeed, it is difficult to determine what provision in New York Civil Service Law §75 that the Petitioner herein is challenging.

POINT II

Goderre's failure to appeal the judgment of Mr. Justice Jones, and failure to object to its admission into evidence at the hearing, require that its correctness be conclusively assumed.

The correctness of the judgment in the false arrest action must be conclusively assumed in the absence of appeal (*Potter* v. *Emerol Manufacturing Co.*, 275 App.Div. 265, 89 N.Y.S.2d 68, at 70 [1st Dept. 1949]), and its effect is that of estoppel binding upon the police officer as well as the municipality itself. *U.S.* v. *County Court of Knox County*, 122 U.S. 306, 7 S.Ct. 1171, 30 L.Ed. 1152 (1887).

POINT III

The City's determination reinstated by the Court of Appeals was supported by substantial evidence and did not violate this Court's "independent judgment" rule.

This Court's seminal opinion in *Morgan* v. *United States*, 304 U.S. 1, 82 L.Ed. 1129 (1937), and its application under New York law (*Kilgus* v. *Bd. of Estimate of City of N.Y.*, 308 N.Y. 620 [1955]; *Taub* v. *Pirnie*, 3 N.Y.2d 188 at 195, 165 N.Y.S.2d 1 at 5 [1957]; *DiMarsico* v. *Ambach*, 48 N.Y. 2d 576, 424 N.Y.S.2d 107 [1979]) was specifically briefed in the Court of Appeals. The Court of Appeals expressly stated that the facts (same as in the above Statement of the Case), clearly indicate that far more evidence than the false arrest judgment was adduced at the fact-finding hearing through Petitioner's own witnesses. Petitioner was represented by counsel.

Petitioner elected his remedy under N.Y. Civil Service Law §§ 75 and 76 to commence an Article 78 proceeding, yet never availed himself of Civil Practice Law and Rules §7804 which provides in pertinent part as follows:

> "* * * The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard".

Petitioner neither replied nor ever moved to strike any material in the answer albeit he was represented by counsel. All that material was in the personnel file made available to Petitioner and his counsel (R. 126-127).

Petitioner makes a vague claim that the typewritten record had gaps and was inaccurate; however, he has never proferred to point out where, nor has he shown any exhibits or testimony missing.

The simple truth of the matter is that the evidence against him was so substantial as to be frightening to think that police conduct such as this actually took place. This is as clear as the facial scars and body tattoos on the shoulder and back of the person described in the warrant the absence of which Petitioner never took interest to note in a non-exigent arrest of the successful false arrest plaintiff. Failing to learn by his mistakes, Petitioner similarly ignored glaring identifying information in arresting a City employee (Perry Maxey) while the first charge was still pending. The disciplinary charge for the latter was withdrawn when Petitioner was fired after hearing on the present charges.

In its brief in the Court of Appeals, the City offered if given the opportunity to spell out in detail its specific findings since Petitioner persists in exhaulting form over substance. Petitioner did not respond to that offer.

CONCLUSION

This application should be denied, because Petitioner fails to meet this Court's threshold jurisdictional requirement, because he is estopped by his own defaults, and because the determination removing him from office was supported by substantial evidence.

Dated: White Plains, New York
April 22, 1981

Respectfully submitted,

RICHARD S. SCANLAN
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(WILLIAM J. TORPY, *Corporation Counsel*)